United States Court of Appeals

for the Second Circuit

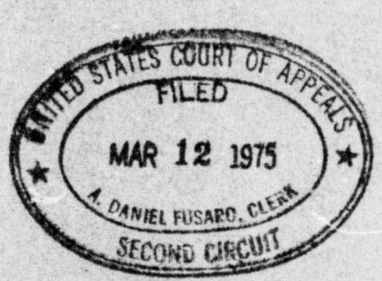
APPELLEE'S BRIEF

74-2550

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2550



BROWNING DEBENTURE HOLDERS' COMMITTEE, et al.,

Plaintiffs-Appellants,

-against-

DASA CORPORATION and ARTHUR ANDERSEN & CO.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE DASA CORPORATION

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PRELIMINARY STATEMENT

Plaintiffs-appellants, the so-called Browning Debenture Holders' Committee (the "Browning Committee"), have appealed from two determinations below:

(1) a judgment of the United States District Court for the Southern District of New York dated October 11, 1974, and filed on October 15, 1974 (the "Judgment"); and

(2) an order of the said District Court, filed on October 11, 1974 (the "Order").

The Judgment dismissed Claims 1 and 2 set forth in the First Amended Complaint (the "Complaint"). The Order denied the motion of the Browning Committee for an order directing that depositions be taken by means of tape recordings and for a pre-trial order limiting issues.

As will hereinafter appear, (a) the issues purportedly raised by Claims 1 and 2 of the Complaint are moot, and do not present a justiciable controversy and (b) the assertions made by such claims are totally unsupported and have been refuted by documentary evidence. As will also appear, (c) the Order is an interlocutory order from which the Browning Committee has no right of appeal, (d) the Order was correctly decided and (e) the relief sought by the Browning Committee which was denied by the Order involved matters within the discretion of the District Court Judge, and no abuse of discretion has been shown.

QUESTIONS PRESENTED

1. Should the appeal from the Judgment be dismissed on the ground that no justiciable controversy exists, so that this Court lacks jurisdiction to entertain the appeal?

2. Did the District Court correctly grant DASA's motion for summary judgment, since the matters complained of in Claims 1 and 2 of the Complaint were moot?

3. Would not DASA have been entitled to summary judgment even if the matters complained of were not moot, on the ground that Claims 1 and 2 of the Complaint fail to state a claim upon which relief can be granted?

4. Would not DASA have been entitled to summary judgment even if the matters complained of were not moot, on the basis of the evidence presented to the District Court?

5. Should the appeal from the Order be dismissed on the ground that it is not an appealable order?

6. Should not the Order be affirmed, on the ground that the motion which was denied by the Order was addressed to matters entirely within the discretion of the District Court Judge, and no abuse of discretion has been shown?

7. Should not DASA be awarded damages and double costs, including attorneys' fees, pursuant to Rule 38 of the Federal Rules of Appellate Procedure, on the ground that this appeal is frivolous?

STATEMENT OF THE CASE

The Browning Committee[1] commenced this action by a motion for a preliminary injunction brought on by Order to Show Cause signed March 30, 1972. In summary, the Complaint sought:

> (a) preliminarily and permanently to enjoin defendants from soliciting and counting consents of the holders (the "Debenture Holders") of the 6% Convertible Subordinated Debentures due July 1, 1987 (the "Debentures") of defendant-appellee DASA Corporation ("DASA"), approving two amendments to the Indenture dated as of July 1, 1967, as supplemented, between DASA and defendant The Bank of New York (the "Bank"), as Trustee (the "Indenture"), providing for:
>
> (i) reduction of the Debenture conversion price from $42.42 to $21.00, and

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1. The Browning Committee, which admittedly owns no securities of DASA, has no standing to sue nor to prosecute this appeal. Independent Investor Protective League v. Saunders, 64 F.R.D. 564 (E.D. Pa. 1974).

(ii) amendment of Section 6.05 to allow DASA to sell, at any one time or from time to time, all or part of the computer systems, peripheral equipment (together the "Equipment") and leases thereof (the "Leases") owned by DASA;

(b) an order declaring DASA's March 9, 1972 solicitation letter to the Debenture Holders (the "Solicitation Letter") void and requiring DASA to distribute a revised Solicitation Letter; and

(c) an order declaring DASA's February 29, 1972 annual meeting of stockholders void and requiring DASA to conduct a new meeting and to distribute new proxy materials in connection therewith.

The Browning Committee brought this action individually, and, additionally, purported to sue as representatives of other security holders of DASA and derivatively, and have named as defendants, DASA, certain present and former officers and directors of DASA, the Bank and Arthur Andersen & Co., although only DASA, the Bank and Arthur Andersen & Co. have been served with process.

The Browning Committee consists of three persons: Roy E. Brewer, who allegedly owns 700 shares of the common stock of DASA and $25,000 face amount of Debentures; Simms

C. Browning, who allegedly owns $50,000 face amount of Debentures; and Bradley R. Brewer, who allegedly owns $52,000 face amount of Debentures and who is also the attorney for the Browning Committee. It thus appears that two of the three members of the so-called Committee do not own any common stock of DASA and, accordingly, have no standing to challenge DASA's 1972 annual meeting of stockholders.

Claims 1 and 2 of the Complaint relate solely to (i) the 1972 Proxy Statement distributed by DASA to its stockholders in connection with DASA's February 29, 1972 annual meeting of stockholders (Ex. D submitted with DASA's summary judgment motion) and (ii) DASA's 1971 annual report (Ex. E submitted with DASA's summary judgment motion). Claims 1 and 2 are directed against all defendants except the Bank.

Claim 3 is made against all defendants and relates to the Solicitation Letter to the Debenture Holders. Claim 4 alleges that the Bank violated its fiduciary duty to the Debenture Holders in connection with the sale of the Equipment and Leases. Claim 5 is made against Arthur Andersen & Co. and relates to DASA's 1970 and 1971 financial statements.

Although the Browning Committee claimed that the reduction of the conversion price of DASA's Debentures created a conflict between DASA's stockholders and DASA's Debenture Holders, the Browning Committee sought to represent

(a) all holders of DASA's Debentures,

(b) all stockholders of DASA,

(c) all persons who are holders of both common stock and Debentures of DASA, and

(d) DASA derivatively.

For some time prior to the commencement of this action, DASA had been suffering from serious financial difficulties. To alleviate these difficulties, DASA sought to sell the Equipment and Leases in order to obtain funds to reduce its indebtedness. Having negotiated with several prospective purchasers, an agreement was reached with a corporation named Datatron Corporation for the sale of the Equipment and Leases.

Because the Indenture provided that the consent of the Debenture Holders was required in order to consummate such a sale, DASA solicited their consent to amendments of the Indenture to permit the sale, and in connection therewith, a reduction in the conversion price of the Debentures from $42.42 to $21.00.

Although the Browning Committee never complained that the sale was in any way unfair or improper and had always admitted that the sale was in DASA's best interests, it nevertheless sought to delay the sale until the management of DASA would agree to an amendment of the Indenture which would reduce the conversion price of the Debentures to a figure somewhere between $6.00 and $12.00. The members of the Brown-

ing Committee, who owned less than 2% principal amount of the Debentures, threatened to commence litigation unless their demands were met.

The Browning Committee revealed its true purpose in communications with DASA prior to this action and admitted the damaging nature of the consequences should DASA not capitulate to its demands. In an enclosure to a letter to DASA dated March 16, 1972, the Browning Committee's attorney stated:

> "A stalemate between Management and the Browning Committee as the result of an unbridgeable gap between (i) the conversion price which Management is willing to recommend and (ii) what the Committee feels is reasonably related to the current market value of the Common Stock and a fair consideration for the debenture holders' consent is certain to result in the commencement by the Browning Committee of legal action seeking the relief described above and raising certain other legal issues. Such litigation might seriously delay (or prevent altogether) the proposed sale of computer assets and otherwise work in ways damaging to the operations of the Corporation and the interests of the Corporation's shareholders and creditors alike." (Exhibit B to affidavit of Richard A. Reichter, sworn to April 7, 1972, submitted in opposition to the Browning Committee's motion for a preliminary injunction) (emphasis added)

The Browning Committee's attorneys confirmed this intent in the same enclosure by demanding that DASA include the following proposal in a letter to Debenture Holders:

> "...that the debenture holders as a group withhold their consent to the proposed sale of assets until the Corporation's Management agrees to reduce the new con-

version price of the debentures to a number, not more than $12.00 and not less than $6.00 reasonably related to the present market value of the Common Stock and acceptable to the Committee...."

After commencement of the litigation, the Debenture Holders were informed of the Browning Committee's efforts to seek a further reduction of the conversion price and were given an opportunity to withdraw their consents, if they had previously given them. Nevertheless, the holders of more than 70% in principal amount of the Debentures approved the sale of the Equipment and Leases and the $21.00 conversion price.

By a Memorandum Opinion and Order filed May 8, 1972, the United States District Court for the Southern District of New York (Motley, J.) denied the Browning Committee's motion for a preliminary injunction in respect of the sale of the Equipment and Leases and stated that "DASA is free to amend the indenture and consummate the sale..."

In so doing, the District Court concluded that "many [of the facts allegedly omitted from the March 9, 1972 solicitation letter] are more supposition and conclusion than fact, and that others are irrelevant, and hence immaterial, to the choice before the Debenture Holders" and that "Both DASA and the holders of the majority of the debenture principal believe DASA will be harmed if the indenture amendments and sale do not proceed."

After carefully reviewing the original 55-page Complaint, the Browning Committee's three memoranda of law

and affidavit and hearing oral argument on the motion of the Browning Committee for a preliminary injunction, Judge Motley observed:

> "In fact, we suspect that much of the motivation for this suit is plaintiffs' desire to bargain defendants to a lower conversion price."

The Browning Committee made clear from the outset that its overriding concern was to achieve a further reduction in the Debenture conversion price at the expense of DASA and its other security holders and that this action was a means of achieving that purpose. With full knowledge of DASA's precarious financial condition, the Browning Committee endeavored to torpedo the sale of the Equipment and Leases, and deliberately saddled DASA with the heavy financial burden of defending this action. This proceeding has been thus revealed to be nothing more than an ill-conceived attempt to force a lower conversion price through trumped-up charges of violations of the proxy rules.

In accordance with Judge Motley's decision, a Second Supplemental Indenture was executed on May 15, 1972 and the Equipment and Leases were sold on June 1, 1972.

On May 22, 1972, the Browning Committee noticed an appeal to this Court from Judge Motley's decision. On August 16, 1972, DASA moved to dismiss the appeal as moot, since the Equipment and Leases had been sold. By an Order dated September 12, 1972, this Court granted DASA's motion and dismissed the appeal.

By an Order to Show Cause dated May 19, 1972, the Browning Committee brought on a motion for a determination, pursuant to Fed. R. Civ. P. 23(c)(1) and Rule 11A of the Civil Rules of the District Court, whether or not this action was to be maintained as a class action and, if so, the membership of the class. The District Court (Griesa, J.), by an endorsement dated January 15, 1973, deferred final determination of the motion until further discovery had been completed and further pre-trial hearings had been held to narrow and eliminate issues.

Although no discovery was thereafter even initiated, much less completed, on or about March 4, 1974, the Browning Committee renewed its class action motion. By a Memorandum, Decision and Order filed July 16, 1974, which evidenced a recognition that the Browning Committee does not represent the interests of anyone, the District Court (Owen, J.) denied the Browning Committee's class action motion.

While claiming that the conversion price of the Debentures proposed by the management of DASA favored its stockholders at the expense of the Debenture Holders, the Browning Committee sought, in the same Complaint purportedly filed on behalf of the Debenture Holders, to represent the stockholders in an attempt to set aside DASA's 1972 annual meeting of stockholders. Although numerous allegations were made, based primarily on erroneous propositions of law, not a

single one was ever supported by any evidence and several were dropped.

Nevertheless, despite a total lack of evidence and apparent purpose, the Browning Committee sought summary judgment on Claims 1 and 2 of the Complaint -- the claims directed against the proxy materials and annual report distributed in connection with the 1972 annual meeting of stockholders -- and requested that the District Court order DASA to rehold that meeting. This request was made despite the facts that (a) the only business transacted at the meeting was the election of directors (most of whom were then directors and running for reelection), and ratification of the selection of Arthur Andersen & Co. as auditors for DASA, (b) the Browning Committee's proposed proxy statement for that meeting (Exhibit to the Rule 9(g) Statement of the Browning Committee, filed on or about April 25, 1973), which it had submitted to the Securities and Exchange Commission but did not distribute to DASA's stockholders, supported management's nominees for election and the ratification of the selection of Arthur Andersen & Co., and, in addition, sought representation of the Debenture Holders on the Board and approval of a reduced conversion price of the Debentures to between $6.00 and $12.00 (which the Browning Committee subsequently claimed would adversely affect the stockholders by diluting their equity in DASA), and (c) the 1973 annual meeting of DASA's stockholders

had been held, at which directors were elected and the selection of Arthur Andersen & Co. ratified (Ex. F submitted with DASA's summary judgment motion).

The motion of the Browning Committee for summary judgment was submitted to Judge Thomas P. Griesa. DASA cross-moved for summary judgment on Claims 1 and 2 of the Complaint.

Judge Motley's doubts as to the bona fides of the Browning Committee's claims in respect of the solicitation of the Debenture Holders' consents to the amendment of the Indenture were echoed by Judge Griesa's obvious skepticism about Claims 1 and 2 of the Complaint. By a Memorandum dated September 27, 1973 (the "Memorandum"), Judge Griesa (a) denied the Browning Committee's summary judgment motion as to Claims 1 and 2 and (b) granted DASA's summary judgment motion and dismissed those two Claims as moot.

In the Memorandum, Judge Griesa noted (p.15) that "plaintiffs had in mind the basic outlines of their claims prior to the meeting, but sought to use them solely as a bargaining point for urging that debenture holders be represented on the board and that the conversion price of the debentures be set in accordance with plaintiffs' wishes."

On or about March 13, 1974, some five and one-half months after the Memorandum was filed, the Browning Committee moved for reconsideration and reargument of the respective summary judgment motions as to Claims 1 and 2, notwithstanding

Rule 9(m) of the General Rules of the District Court requiring that such a motion must be made within ten days of the filing of the Memorandum. By a Memorandum, Decision and Order filed July 16, 1974, the District Court (Owen, J.) denied the Browning Committee's motion for reconsideration and reargument. At the request of the Browning Committee, the Judgment was entered herein dismissing the Complaint as to Claims 1 and 2 and was filed on or about October 15, 1974.

By a Notice of Motion dated July 26, 1974, the Browning Committee moved for an order directing that depositions may be taken through the use of tape recording devices and for a pretrial order directing that DASA submit and serve proposed findings of fact with respect to Claim 3 and for related relief. That motion was denied by the Order, which was endorsed on the back of the Browning Committee's July 26, 1974 Notice of Motion, and which was filed October 11, 1974. The Order did not involve a final judgment, nor did Judge Owen, in filing the Order, make the statement in writing required by 28 U.S.C. §1292(b) for the taking of a permissive appeal from the Order. Thus, the Order is clearly not appealable.

ARGUMENT

Point I

Claims 1 and 2 of the Complaint are moot

As set forth above, the relief sought by the Browning Committee, based upon Claims 1 and 2, is a decla-

ration that, because of the alleged falsity of the proxy material and annual report sent to DASA's stockholders in connection with DASA's 1972 annual meeting of stockholders, the said annual meeting should be declared void and that DASA should be directed to circulate new proxy material for a new 1972 annual meeting. Those Claims are completely moot because of the fact that new proxy material and a new annual report were distributed to the stockholders and a 1973 annual meeting of DASA was held at which directors were again elected and the appointment of Arthur Andersen & Co. was again approved. Indeed, a 1974 annual meeting has been similarly held and new proxy material and a new annual report distributed in connection with that meeting.

As Judge Griesa pointed out in the Memorandum (p.14):

> "The 1973 annual meeting has been duly held. Seven directors have been elected -- four of whom are the same as those elected in 1972, and three of whom are new.
>
> It would be an obvious absurdity to order revision of the 1972 proxy material and the holding of a new 1972 annual meeting. It is unnecessary to labor the point. Suffice it to say that the only actions taken at the 1972 annual meeting, based upon the 1972 proxy materials, were the election of the seven directors for one-year terms and the approval of Arthur Andersen & Co. as auditors for the fiscal year ending October 31, 1972. The directors elected at the 1972 annual meeting have completed their terms and Arthur Andersen & Co. has carried out its audit."

If it would have been absurd in September, 1973 to consider ordering a repeat of DASA's 1972 annual meeting, it

would now be even more absurd. At that time, the intervention of the 1973 annual meeting rendered moot any questions concerning the 1972 meeting. Now the 1974 meeting, at which directors were again elected and the appointment of Arthur Andersen & Co. again approved, has also intervened. Accordingly, Claims 1 and 2, which challenge the 1972 meeting, are moot. Phillips v. The United Corp., 5 SEC Jud. Dec. 758 (S.D.N.Y. 1948), appeal dismissed, 171 F.2d 180 (2d Cir. 1948).

Phillips completely disposes of Claims 1 and 2. Thus, in words apposite here, the Court in Phillips wrote:

> "I am satisfied that the election of the directors at the April 1948 meeting has rendered moot all questions raised by plaintiff as to the validity of their election in April 1947. Their one year term has expired. They are now members of a board of directors elected for a new term. Their title to office under the April 1948 election is not challenged. Their election was not even contested; they received the votes of three quarters of the outstanding stock.
>
> "There can be no question as to the validity of the official acts of the prior board, elected at the April 1947 meeting, during the year that they held office. Their term of office has now expired. Assuming, arguendo, that their election in April 1947 was not valid, they were nevertheless de facto directors until removed in a proper proceeding. Further, they were already directors at the time of the April 1947 election having been elected in 1946. Under the charter and by-laws, the directors elected in 1946 held office until their successors were elected and qualified. The decided cases support defendant's contention that the

> election of the directors at the 1948 annual meeting of stockholders renders moot the question of the validity of the election of the Board at the 1947 annual meeting. Julius Grossman Inc. v. Staff, 252 N.Y. App. Div. 886; Fukucki v. Takeshige, 106 Cal. App. 78; In Re Mathiason Mfg. Co., 122 Mo. App. 437; Pope v. Whitridge, 110 Md. 468." (emphasis added) 5 SEC Jud. Dec. at 762.

The terms of the directors elected on February 29, 1972, and the audit conducted by Arthur Andersen & Co. for the year ending October 31, 1972, are now completed and are remote in time. Since the Browning Committee has not alleged any monetary damages to them or to anyone else in respect of the 1972 meeting, the prosecution of this appeal cannot conceivably be a benefit to anyone. The relief sought by the Browning Committee -- an order directing the totally useless and wasteful resolicitation of proxies for DASA's 1972 annual meeting after two subsequent annual meetings have been held -- cannot possibly serve to remedy any of the wrongs alleged.

In his detailed and considered opinion, Judge Griesa determined that there was no valid demand for damages based upon Claims 1 and 2, and stated:

> "Plaintiffs' position with respect to damages is cryptic, to say the least. Indeed, in my view, plaintiffs have totally failed to describe, either in their pleading or otherwise, how the alleged falsities in the 1972 proxy materials and in the 1971 annual report caused any injury or damages to DASA, to plaintiffs, or to the classes of shareholders and debenture holders they purport to represent. To be sure, in the prayer for relief at the conclusion of the

first amended complaint there are requests for damages...

But these requests for damages are not tied to any specific claim or claims in the complaint. Nor, as already indicated, is there any statement in Claim 1 or Claim 2 alleging that the asserted wrongdoing caused any specified injury or damages. Moreover, most of the prime targets of the stated damage demands described above -- the officers and directors of DASA -- have not been served with process, although this action has been pending for 18 months.

In addition, in my view, the undisputed facts on the present motions conclusively negate any valid, provable claims for monetary damages under Claims 1 and 2..." (pp. 16-17) (emphasis added)

The observations of Judge Griesa as to the lack of monetary damages were not made, as the Browning Committee argues, as an alternative justification for his ruling and are not in any way inconsistent with the principles expressed in the cases cited by the Browning Committee (Brief, pp. 31-32). The lack of monetary damages has a direct bearing on the question of mootness. Having determined that the change in circumstances resulting from the holding of the 1973 Annual Meeting rendered moot the equitable relief requested by the Browning Committee, Judge Griesa considered whether the matters complained of could have caused monetary damages, because, if there were monetary damages, the matter might not have been moot even though the change in circumstances had made the equitable relief requested academic. Liner v. Jafco, Inc., 375

U.S. 301 (1964).

However, since there was no longer any basis for equitable relief and no monetary damages, there was nothing the District Court could do for the Browning Committee. There was no justiciable controversy. It is respectfully submitted that Claims 1 and 2 of the Complaint are completely moot and that the appeal from the Judgment should therefore be dismissed.[2] Where the questions presented on appeal are moot, there is no justiciable controversy and the appeal must be dismissed. St. Pierre v. United States of America, 319 U.S. 41. See also Liner v. Jafco, Inc., supra. Therefore, the appeal as to the Judgment should be dismissed.

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2. By a Notice of motion dated January 2, 1975, DASA moved to dismiss this appeal (a) from the Judgment, on the ground that the relief sought was moot, and (b) from the Order, on the ground that it was not appealable, and for an award of damages and costs, pursuant to Rule 38 of the Federal Rules of Appellate Procedure. This Court denied DASA's motion "without prejudice to renewal on appeal." The statements in the Browning Committee's Memorandum of Law dated February 11, 1975, which was submitted in addition to its Brief, that the Court, in denying the motion, found merit in this appeal and rejected DASA's arguments (Memo., pp.5-6) are incorrect. The motion was denied "without prejudice to renewal on appeal" so that the Court could consider the points raised in the context of the entire record and all of the arguments made in the briefs.

Point II

The assertions of the Browning Committee that the 1972 Proxy Statement contains false, deceptive or misleading statements or omissions are demonstrably untrue and have been proved to be false by the documentary evidence

Even if Claims 1 and 2 of the Complaint were not moot and presented a justiciable controversy, on the basis of the evidence submitted to the District Court, DASA would nevertheless have been entitled to summary judgment dismissing those Claims. Rule 56(e) of the Federal Rules of Civil Procedure provides that where a motion for summary judgment is supported by affidavits setting forth facts which would be admissible in evidence, a party opposing that motion may not rely upon his pleadings but must himself present evidence controverting the evidence put forward by the proponent of the motion.

On its cross-motion for summary judgment, and in opposing the motion of the Browning Committee, DASA offered an extensive affidavit together with documentary evidence which conclusively showed that the claims of the Browning Committee were the purest fantasy. In opposing DASA's motion and supporting its own, the Browning Committee offered only the bare, conclusory allegations of the Complaint. On this basis alone, Judge Griesa's decision in favor of DASA and against the Browning Committee was correct. The

evidence which DASA put forward, moreover, established conclusively that the claims of the Browning Committee were without substance.

At the February 29, 1972 annual meeting of DASA's stockholders the number of directors was fixed at seven and seven directors were elected to serve on the Board of Directors until the next annual meeting of stockholders, and the selection of Arthur Andersen & Co. as DASA s auditors for the fiscal year ending October 31, 1972 was ratified. No other business came before the meeting. The stockholders were neither called upon to consider or act upon, nor was their authorization or approval required in respect of, any other matters.

Stockholder consideration and action as to the amendment of the Indenture and sale of the Equipment and Leases was not required by any statute or regulation. Although the Browning Committee asserts that DASA's stockholders should have been given an opportunity to approve or disapprove the proposed sale (Brief, p.20), no authority, statutory or otherwise, is presented in support of that assertion. The question is governed by the law of Massachusetts, the jurisdiction of incorporation of DASA. Under Massachusetts law, stockholder approval of the sale was not required. Mass. Gen. Laws, c. 156B §75; George H. Gilbert Mfg. Co. v. Goldfine, 317 Mass. 681 (1945); Susser v. Cambria Chocolate, 300 Mass. 1 (1938).

Based upon the erroneous and unsupported premise that the stockholders should have been given an opportunity to approve or disapprove the sale of the Equipment and Leases, the Browning Committee proceeded to fabricate a demonstrably erroneous critique of the 1972 Proxy Statement.

The 1972 Proxy Statement, which was submitted to the Securities and Exchange Commission before being sent to DASA's stockholders, conforms in all respects to the requirements of Section 14 of the Securities Exchange Act of 1934 and Regulation 14A promulgated thereunder, when judged, as it properly should be, in light of the matters being presented to the stockholders for consideration and action -- the election of directors and the ratification of the selectior of auditors.

The Browning Committee attempts to have the 1972 Proxy Statement judged as if stockholder approval of the sale of the Equipment and Leases was required by law. Moreover, as will hereinafter appear, each and every criticism of the 1972 Proxy Statement and 1971 Annual Report are proved to be erroneous by those documents themselves and DASA's certified financial statements for its fiscal year ended October 31, 1972.

Although not required by any statute or regulation, for the information of the stockholders, the 1972 Proxy Statement contained five descriptive paragraphs relating to the sale of the Equipment and Leases (pp. 6-7).

The Browning Committee asserts (Brief, pp.10-11) that the statement appearing in the last paragraph of the description of the proposed sale that the "need for working capital would be satisfied for the foreseeable future if the sale of the computer systems ... is consummated" is either false or misleading. That assertion is demonstrably untrue. The Browning Committee has presented no evidence that DASA had after the sale or now has or will have any working capital problems and thus has no basis to challenge the statement. On the contrary, as appears in DASA's 1972 Annual Report (Ex. G submitted with DASA's summary judgment motion), during its fiscal year ended October 31, 1972, DASA's working capital position improved dramatically--from a negative ratio to a positive ratio of almost three-to-one. Thus, DASA's certified financial statements contained in the 1972 Annual Report show that -

(a) On October 31, 1971 DASA had total current assets of $4,302,031 and total current liabilities of $5,037,545 for a net working capital deficit of $735,514 (pp.6-7); and

(b) On October 31, 1972 DASA had total current assets of $3,856,081 and total current liabilities of $1,316,865 for a net working capital surplus of $2,539,216 (pp.6-7).

And insofar as the Browning Committee contends (Brief, p.10) that DASA misrepresented the severity of its working capital deficit and understated its need to generate immediate cash through the proposed sale of the Equipment and Leases, since DASA disclosed its working capital deficit, the accuracy of which the Browning Committee has not challenged, and since DASA also disclosed the magnitude of the transaction in terms of book value and percentage of assets, as well as possible alternatives to the sale, this contention of the Browning Committee is also demonstrably without merit. Thus, the 1972 Proxy Statement (p.7) stated:

> "The computer systems to be sold had a net book value of $2,308,000 on January 10, 1972 representing approximately 19% of the book value of the Company's total assets..."

The 1972 Proxy Statement (p.7) also stated:

> "As a result of losses incurred during the fiscal year ended October 31, 1971 and the continuing lower sales volume of Magicall products to Western, the Company may require additional working capital in excess of amounts presently available under its existing bank credit line. This need for working capital would be satisfied for the foreseeable future if the sale of the computer systems, as described above, is consummated. If such sale is not consummated, it might be necessary for the Company to borrow additional funds. At present the Company has made no arrangements for such additional borrowings and there can be no assurance that the Company will have the ability to make any such borrowing." (emphasis added)

In light of the fact that the stockholders were not being asked to approve the sale of the Equipment and Leases, but were merely being informed of a contemplated transaction in respect of which their approval was not required, this description of working capital problems, it is respectfully submitted, was clearly sufficient.

The uniquely untenable position of the Browning Committee is highlighted by their assertion of the importance of the sale which that same Committee sought to thwart, and its claim that DASA failed to disclose its importance. But the 1972 Proxy Statement itself belies these unsupported assertions.

The Browning Committee also asserts (Brief, pp.10-11) that DASA improperly failed (a) to inform the stockholders that DASA intended to reduce the Debenture conversion price to encourage Debenture Holders to consent to the sale of the Equipment and Leases, (b) to disclose the alleged dilutive effect of such proposed reduction and (c) to describe how the new conversion price would be determined. Once again the Browning Committee does not point to any statute or regulation requiring disclosure of the proposed Debenture conversion price reduction or a discourse on its effect in the 1972 Proxy Statement.

On December 12, 1971, DASA's Board of Directors had tentatively pegged the new conversion price at $32.00. On January 24, 1972, DASA's common stock was trading in the

over-the-counter market at approximately $5.00 a share. (Affidavit of I. Michael Bayda, sworn to March 19, 1973 submitted in support of DASA's summary judgment motion, ¶27) Accordingly, as a practical matter, there was no possibility of conversion of the Debentures, which are interest bearing, into DASA's common stock having a fraction of the value of the Debentures.

Aside from the fact that DASA's stockholders were not required to, and were not being called upon to, approve or disapprove the sale of the Equipment and Leases and the reduction in the Debenture conversion price, the margin between the $32.00 conversion price contemplated on January 24, 1972 and the market price of DASA common stock on that date was so great as to render the matter completely immaterial to DASA's stockholders. There was no dilutive effect.

The Browning Committee also asserts (Brief, p.11), that the 1972 Proxy Statement did not disclose that the selection of a new conversion price by DASA's management involved a conflict of interests between the interests of the shareholders in keeping the conversion price as high as possible and the interests of the Debenture Holders in reducing the conversion price as much as possible. Again, an actionable claim is not stated. First, as stated above, the matter was not being submitted to stockholders for approval.

Second, the duty of DASA management was to the stockholders, and not the Debenture Holders. Third, since the Browning Committee contends DASA management favored the stockholders in selecting the new conversion price, the stockholders would have no standing to complain of it. And presumably Claims 1 and 2 were purportedly made on behalf of stockholders, and not the Debenture Holders.

The obligation of officers and directors to protect stockholders' equity does not mean that the corporation may not enter into a transaction having a possible dilutive effect for a fair consideration. Such a transaction might include the issuance of additional stock or stock purchase rights or warrants or securities convertible into stock or, as here, reduction in the conversion price, but such reduction was made in consideration for the consent by the Debenture Holders to the sale of the Equipment and Leases. The Browning Committee has not contended that the consideration received by DASA for the reduction in the conversion price was in any way unfair. Thus, it cannot be said that such reduction was not in the best interests of the stockholders in the context of the transaction in respect of which such reduction was made.

With regard to the interests of the Debenture Holders, neither DASA nor its officers or directors had any

duty to serve the interests of the Debenture Holders in fixing the new conversion price. Chamberlain v. James, 294 Mass. 1 (1936); Thomas v. N.Y. & G.L.R. Co., 139 N.Y. 163 (1893); Uhlman v. New York Life Insurance Company, 109 N.Y. 421 (1868); Stevenson v. Go-Gas Co., 268 N.Y. 371 (1935); Chalmers v. Nederlandsch Amerikaansche, etc., 36 N.Y.S.2d 717 (City Ct. 1942). Debenture Holders are merely creditors of the corporation, United Lines Telegraph Co. v. Boston Safe Deposit & Trust Co., 147 U.S. 431 (1892), whose rights are determined only by the contract between the corporation and such holders. Alladin Hotel Company v. Bloom, 200 F.2d 627 (8th Cir. 1953). A holder of convertible debentures has no more rights than an ordinary debenture holder until such time as he converts his debentures into stock. Pratt v. American Bell Telephone Co., 141 Mass. 225 (1886).

Thus, contrary to the totally unsupported assertions of the Browning Committee, neither DASA nor its officers or directors nor its stockholders had a duty to serve the interests of the Debenture Holders, other than those contractual duties prescribed by the Indenture. The Browning Committee makes no claim that those duties were not fulfilled.

Indeed, the main complaint of the Browning Committee, whose group includes both Debenture Holders and a stockholder, appears to be that the Debenture Holders were not fairly

treated in the matter of setting a new conversion price. But the Browning Committee cites no authority -- nor can it -- to the effect that DASA was required to reduce the conversion price of the Debentures at all -- much less to a price related to the market price of DASA's common stock. Moreover, the Browning Committee completely ignores the fact that the market price of DASA's common stock was disclosed to the Debenture Holders in the Solicitation Letter (Ex. H submitted with DASA's summary judgment motion, p.3), and that the federal securities laws are concerned only with disclosure, and not the fairness of a transaction. Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972); Dreier v. The Music Makers Group, Inc., [1973-4 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,406 (S.D.N.Y. 1974).

More important, however, the Browning Committee's contention is totally irrelevant to the present motion. The Browning Committee has apparently made Claims 1 and 2 of the First Amended Complaint in its self-appointed role as a purported representative of DASA's stockholders, not as a representative of Debenture Holders. If, contrary to the authorities cited above, DASA did have a duty to serve the interests of the Debenture Holders in the determination of a new conversion price and did not fulfill it, the stockholders have no standing to complain of it or of any unfairness to Debenture Holders in that regard. Sargent v. Genesco, Inc., 352 F.Supp. 66 (M.D.Fla. 1972), rev'd in part on other grounds, 492 F.2d. 750 (5th Cir. 1974).

It thus clearly appears that DASA fully and fairly disclosed all matters required by the proxy rules. And even assuming, however, the unsupported and unsupportable arguments of the Browning Committee that the alleged "defects" did exist, Claims 1 and 2 would nevertheless not be actionable, because of the absence of the essential element of materiality.

The test of materiality, as set forth in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), is that a material deficiency in proxy soliciting material is one which may be reasonably calculated to have affected the decision of the shareholder based on that material. Thus, Mr. Justice Harlan stated:

> "Where the misstatement or omission in a proxy statement has been shown to be 'material,' as it was found to be here, that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This requirement that the defect have a significant propensity to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by §14(a)." 396 U.S. at 384

"Close questions of finality are not

The Browning Committee, after citing Mills and a number of other cases purportedly relevant to this action, makes absolutely no showing of any connection between the vote of the stockholders on the election of directors and ratification of selection of auditors and the material it would have had DASA include in the 1972 Proxy Statement.

Indeed, since stockholder action was neither required nor requested in respect of the sale of Equipment and Leases and the reduction in the Debenture conversion price, a lengthy explanation to the stockholders of all of the implications pertaining to those matters was not warranted.

The Browning Committee attempts to compare the 1972 proxy statement with the March 9, 1972 Solicitation Letter to Debenture Holders to support its conclusion that information was not disclosed to the stockholders. The fact is that the Debenture Holders were being asked to approve the sale of the Equipment and Leases, so that they were furnished with information which might have a bearing on the determination they were being asked to make. The stockholders, on the other hand, were not being requested to make that determination, so a recitation to the stockholders of all of the details was not warranted. In the context of the matters to be considered by the stockholders for a vote at

the 1972 Annual Meeting, the description of the sale was more than adequate. In fact, the very purpose of the proxy rules would be defeated by including in a proxy statement voluminous details of transactions, particularly where consent to those transactions is not being solicited.

The 1972 Proxy Statement must be viewed in the context of matters presented to the stockholders on February 29, 1972 -- the election of directors and the ratification of selection of auditors -- and not in the context of matters which the Browning Committee erroneously asserts should have been presented. It is respectfully submitted that when properly judged in the context of matters before the stockholders and against the requirements of the applicable statutes and regulations, and appropriate standards of reasonableness and materiality, the 1972 Proxy Statement fully and fairly disclosed all matters required to be disclosed.

In the motions for summary judgment, both sides acknowledged that there were no genuine issues as to any material fact. The only questions before the District Court were questions of law. Because Claims 1 and 2 were moot, there was no need to consider the questions of law, but it is respectfully submitted that DASA would have been entitled to summary judgment on Claims 1 and 2 even if they were not moot, both because the propositions of law on which they were based are erroneous, and because the evidence submitted to the District Court conclusively refuted the allegations made in those claims.

Point III

The 1971 Annual Report is not Subject to Attack under the Proxy Rules

In Point IV of the Brief of the Browning Committee, it asserts that, in addition to the requirements of Rule 14a-3 of the Proxy Rules promulgated by the Securities and Exchange Commission under §14 of the Securities Exchange Act of 1934 (15 U.S.C.A. §78(n)), which pertains to annual reports to security holders, DASA is subject to civil liability under Rule 14a-9 for alleged misrepresentations and omissions in the 1971 Annual Report. Aside from the fact, as the contents of the 1971 Annual Report itself make clear, that the criticisms of the 1971 Annual Report are erroneous and unsupportable, the Browning Committee's assertion as to the applicability of Rule 14a-9 is directly contradicted by Rule 14a-3(c), which reads as follows:

> "(c) Seven copies of each annual report sent to security holders pursuant to this rule shall be mailed to the Commission, solely for its information, not later than the date on which such report is first sent or given to security holders or the date on which preliminary copies of solicitation material are filed with the Commission pursuant to Rule 14a-6(a), whichever date is later. The annual report is not deemed to be 'soliciting

> material' or to be 'filed' with the Commission or subject to this regulation otherwise than as provided in this rule, or to the liabilities of Section 18 of the Act, except to the extent that the issuer specifically requests that it be treated as a part of the proxy soliciting material or incorporates it in the proxy statement by reference." (emphasis added)[3]

Thus, the assertion of the Browning Committee that the 1971 Annual Report is subject to Rule 14a-9 is directly contradicted by the express language of Rule 14a-3. And see Dillon v. Berg, 326 F.Supp. 1214 (D.Del. 1971), aff'd, 453 F.2d 876 (3d Cir. 1971), which squarely rejects the proposition the Browning Committee now urges upon this Court. The Court in Dillon stated:

> "...the Court is of the opinion that a careful reading of the rule, particularly the language emphasized, compels the conclusion that Rule 14a-3(c) exempts the annual report and the statements contained in it from liability imposed under any rule, other than Rule 14a-3, promulgated under section 14(a) of the Act, including Rule 14a-9." 326 F.Supp. at 1230

In arguing that the Securities and Exchange Commission had no authority to adopt Rule 14a-3(c) (Brief, Point IV), the Browning Committee misconstrues the purposes

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3. DASA neither requested that the 1971 Annual Report be treated as part of the 1972 Proxy Statement, nor incorporated said Report therein by reference. (Ex. D submitted with DASA's summary judgment motion)

of §14 of the Exchange Act and the proxy regulations. The regulations of the Securities and Exchange Commission require that financial statements be filed and distributed to stockholders in connection with the solicitation of proxies for various types of transactions, such as a merger, consolidation, sale of assets, and other matters where financial statements may affect the decision of the stockholder in deciding how to vote.

However, the Commission has also determined that financial statements need not be filed with respect to routine matters such as the election of directors and the selection of auditors. The Browning Committee has not suggested any legal basis for its contention that Rule 14a-3(c) is invalid, nor offered any authority to support that contention. And of equal significance is the fact that, as will hereinafter appear (Point IV, infra), Claim 2 of the Complaint has been conclusively refuted by the Annual Report itself, apart from the fact that the claim is moot.

Accordingly, with respect to the 1971 Annual Report, the Browning Committee has not stated any Federal claim.

Point IV

The assertions in Claim 2 of the Complaint that the 1971 Annual Report contains any false, deceptive or misleading statements or omissions are erroneous and have been proved to be false by the Annual Report itself

As it had done with respect to Claim 1, the Browning Committee moved for summary judgment on Claim 2 of the Complaint without offering any evidence to the District Court, or even suggesting that any such evidence existed. The motion was made on the unsupported and conclusory allegations of the Complaint alone.

The criticism of the 1971 Annual Report rests solely upon (a) an allegedly misleading phrase contained in Richard A. Reichter's nine paragraph President's Message and (b) the allegedly deceptive representation of the existence of an intangible asset valued at $1.5 million on DASA's balance sheets. (Brief, pp. 12-13) As will hereinafter appear, both criticisms of the 1971 Annual Report are wholly without merit.

The President's Message (Ex. E submitted with DASA's summary judgment motion, p.1) in part stated:

> "Even though we were required to face the above mentioned difficulties during the past fiscal year, the financial position of our Company has been, none the less, significantly improved. During 1971, Corporate indebtedness was reduced by more than 5.6 million dollars."

The quoted language is clear and unambiguous. Thus, the affidavit of Richard A. Reichter, sworn to the 7th day of April, 1972, submitted in opposition to the Browning Committee's motion for a preliminary injunction, stated (¶22):

> "In Paragraph (21)(b) of the complaint, with reference to my statement that during the fiscal year ended October 31, 1971 the financial position of DASA had been significantly improved, plaintiffs attempt to substitute their uninformed opinion that this was not true. My statement was based on the facts that during the fiscal year ended October 31, 1971, in spite of the many problems faced by DASA, total corporate indebtedness was reduced by more than $5,600,000."
> (emphasis added)

Moreover, the Browning Committee attempts to remove the statement from its proper context by completely ignoring Mr. Reichter's lengthy discussion of "the above-mentioned difficulties during the past fiscal year" which preceded his statement that DASA's financial position had significantly improved. The utter worthlessness of the Browning Committee's assertion is completely established when that statement is read in the context of the entire President's

Message and the accompanying financial statements, which clearly show the "difficulties" which the Browning Committee ignores.

The futility of the strained attempt to establish a claim of falsity through distortion of a single phrase in the nine paragraph President's Message is readily apparent. But even more important, as appears in the 1971 Annual Report, DASA's financial position did indeed improve in 1971 by a more than $5.6 million reduction in corporate indebtedness. Thus, DASA's certified financial statements (Ex. E submitted with DASA's summary judgment motion, p.5) show that -

(a) On October 31, 1970, the sum of DASA's total current liabilities ($8,523,554) and long-term debt ($9,306,646) was $17,830,200; and

(b) On October 31, 1971, the sum of DASA's total current liabilities ($5,037,545) and long-term debt ($7,156,465) was $12,194,010.

The Browning Committee also alleges that DASA misrepresented its assets by including in its balance sheet an asset valued at $1.5 million dollars. Once again, this is just not correct. DASA has repeatedly advised its stockholders that the $1.5 million asset was an intangible asset representing the present and future earning capacity of Cyber-tronics, Inc. ("CTI") and its personnel.

DASA's consolidated balance sheet as of October 31, 1970 appearing on page 10 of DASA's 1970 Annual Report (Exhibit I submitted with DASA's summary judgment motion) stated that the $1,500,000 asset represented "EXCESS OF PURCHASE PRICE OVER NET ASSETS ACQUIRED" and referred to Note 1 to the financial statements, which Note clearly explained its derivation and nature.

The introductory portion of the 1970 Annual Report also stated in part (p.3) as follows:

> "On the date of the merger of CTI, the excess of purchase price over the underlying book value of assets acquired was $8,359,000, and such amount together with costs and expenses associated with the merger amounting to $1,126,000 were originally set up on the books of the company as Goodwill. At year-end your management reviewed this intangible asset to determine whether any adjustment should be made on the carrying value of the Goodwill. Considering the future earning capacity of CTI and its other intangibles, a value of $1,500,000 has been determined as the current value of the CTI Goodwill. This resulted in a chargeoff of the excess Goodwill in the amount of.....$7,985,000." (emphasis added)

The consolidated balance sheet as of October 31, 1971 appearing in DASA's 1971 Annual Report (p.4) stated that the $1,500,000 asset represented "Excess of Purchase Price Over Net Assets Acquired" and referred to Notes 1 and 3 to the financial statements.

Note 1 reads in part as follows:

> "Management anticipates that the opportunity to sell or lease and install MAGICALL® on a direct basis in the United States will account for an increasing portion of the Company's business in the future; however, management recognizes that the success of this new direct program is contingent upon its ability to perform the functions previously performed by others. Management further anticipates that its field service organization will be utilized in connection with this new direct sales program as well as with the existing unit record equipment activities. In the opinion of management and the Company's Board of Directors, the remaining 'Excess of Purchase Price Over Net Assets Acquired' continues to have a value of $1,500,000 because of these and other considerations." (emphasis added)

Thus, it has repeatedly been made crystal clear to the stockholders that the $1,500,000 asset is an intangible asset based upon the present and future earning capacity of the assets and personnel acquired from CTI and, the arguments of the Browning Committee (Brief, p.13) to the contrary notwithstanding, it is respectfully submitted that one need not be a trained financial analyst to understand that message. The fact that DASA's auditors highlighted the nature of this asset in their report neither negates its existence nor affects the disclosure made by DASA as to its nature as aforesaid. That report, simply stated, points out to the reader that realization of the asset is contingent upon the earning capacity of the assets and personnel to which it pertains, which is essentially the same disclosure made by DASA in the financial statements.

Point V

The Order of Judge Owen is not appealable

The October 11, 1974 Order of Judge Owen denied the Browning Committee's motion for an order directing that depositions be taken by means of two tape recorders and for a pre-trial order limiting the issues in the action.

Orders denying motions for the direction of discovery are interlocutory and not appealable. Thus in Louie v. Carnevale, 443 F.2d 912 (9th Cir. 1971), the Court dismissed an appeal from an order denying plaintiff's motion for inspection and copying pursuant to Rule 34 of the Federal Rules of Civil Procedure. See also Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969), in which the Court dismissed an appeal from an order of a district court compelling the disclosure of certain business information by a non-party witness. Orders disposing of motions seeking pre-trial orders limiting issues are similarly interlocutory. 3 Moore's Federal Practice (2nd Ed.) 16.21, pages 1140-1141.

Such interlocutory orders are not appealable unless the District Court judge makes a statement in writing pursuant to 28 U.S.C.A. §1292 (b) that such order involves a controlling question of law as to which there is substantial difference of opinion, and that an immediate appeal

would advance the litigation. Judge Owen has made no such statement. Therefore the appeal as to the Order should be dismissed.

Procedural orders involving discovery and pre-trial orders, such as those embodied in the Order, do not come within either of the theories which the Browning Committee advances (Brief, p.3 and Memorandum of Law) in support of its contention that an appeal from the Order is properly taken.

In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), cited by the Browning Committee, the United States Supreme Court recognized an exception to the final judgment rule in cases involving certain collateral orders. In Cohen, a shareholder commenced a derivative action, and the defendant moved for an order directing plaintiff to comply with a state statute that required a plaintiff in a derivative action to post a bond for costs. The District Court denied the motion, and the Court of Appeals reversed. On Certiorari the Supreme Court held that the appeal was properly taken, on the ground that the Order appealed from was a final determination, which would not be merged in the final judgment, of a substantive right separate from and collateral to that sought to be enforced in the action, and one which, because of its nature, would have been lost if appellate review had been deferred until final judgment.

The procedural relief denied in the Order here involved no substantive rights; it was not separate from or collateral to the action, but was merely a step toward final judgment. As such, the Supreme Court explicitly recognized in Cohen that there may be no intrusion by appeal, 337 U.S. at 546. In fact, this Court has held that Cohen leaves unchanged the general rule that discovery orders are interlocutory and not appealable. American Express Warehousing, Ltd. v. Transamerica Insurance Co., 380 F.2d 277, 280 (2d Cir. 1967).

As to the denial in the Order of the Browning Committee's motion for a pre-trial order, the inapplicability of Cohen is equally clear. Determination of a motion for a pre-trial order limiting issues involves consideration of the substantive core of the action and is the very antithesis of the collateral order envisioned in Cohen. See, e.g., Borden Co. v. Sylk, supra, where the Court observed (p.846), referring to a discovery order, "if the propriety of the lower court's order can be determined only by making reference to the substantive litigation, then clearly, it is not a 'collateral' matter within the Cohen meaning."

In Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), cited by the Browning Committee as authority for the proposition that the Order is a final order, the plaintiff sought recovery, on her own behalf and on behalf of her

husband's dependent brother and sisters, under the Jones Act, the general maritime law and state statutes, for her husband's death. The District Court, holding that the Jones Act provided the exclusive remedy, struck the claims under the general maritime law and state statutes and struck references to recovery for the brother and sisters, who were ineligible to claim under the Jones Act. Plaintiff appealed to the Court of Appeals, and, when the appealability of the decision was challenged, sought mandamus directing the District Court to certify the question for appeal. The Court of Appeals declined to decide the question of appealability, which it termed a "close" question. The United States Supreme Court held that the Court of Appeals had been correct in entertaining the appeal, since (a) the order was arguably a final order, (b) the substantive rights of the brother and sisters had been completely terminated by the order and (c) a determination of the issues was "fundamental to the further conduct of the case." The elements found in Gillespie are absent here. There is no question as to the finality of the Order; it is clearly interlocutory.

Thus, in Borden, supra, the Court, considering the argument that an order was appealable under Gillespie, stated:

"Close questions of finality are not ordinarily presented where, as here, the appeal is from an order compelling or denying discovery. This is so because such orders bespeak their own interlocutory character. They are necessarily only a stage in the litigation and almost invariably involve no determination of the substantive rights involved in the action." 410 F.2d at 845

Point VI

The District Court correctly denied the motion of the Browning Committee for an order directing that depositions be taken through the use of tape recordings and directing DASA to submit and serve proposed findings of fact with respect to Claim 3 of the Complaint

DASA opposed the procedure suggested by the Browning Committee for the conduct of depositions in this action, on the ground that, as hereinafter appears, it was apparently sought as an inexpensive means of further harassing DASA. Further, the proposed procedure did not include the safeguards contemplated by Rule 30(b)(4) of the Federal Rules of Civil Procedure, and sought to dispense with an independent operator.

DASA could only conclude that the purported discovery procedures utilized in this action thus far have been designed to harass DASA. DASA has contended from the

commencement of this action that the claims of the Browning Committee in this action are not bona fide; that the real purpose of the Browning Committee in commencing this action was to force the management of DASA to acquiesce in its demands that the conversion price of the Debentures be reduced to a figure specified by the Browning Committee. Having failed in this attempt, the Browning Committee's continued prosecution of this action appears to be designed to harass and oppress, and the Browning Committee sought to effectuate such apparent purpose by the abusive utilization of pre-trial discovery procedures.

Thus, as set forth in the discussion below concerning the motion for a pre-trial order, the Browning Committee has three times served the same document on DASA, changing only its title. First, it was called a Rule 9(g) Statement. The second time it was called a Request for Admission of Facts. The third time it was called Proposed Findings of Fact, which differed from the first two documents only by the addition of arguments at the end.

DASA further objected to the motion for an order directing that depositions be taken by tape recordings on the ground that the Browning Committee sought to dispense with an independent operator and to eliminate necessary safeguards. Where the taking of depositions has been per-

mitted through the use of tape recordings, the weight of authority has required that the equipment be operated by an independent operator. Jarosiewicz v. Conlisk, 60 F.R.D. 121 (N.D. Ill. 1973); Kallen v. Nexus Corp., 54 F.R.D. 610 (N.D. Ill. 1972); Carson v. Burlington Northern Inc., 52 F.R.D. 492 (D. Neb. 1971); Wescott v. Neeman, 55 F.R.D. 257 (D. Neb. 1972). Cf. Marlboro Products Corp. v. North American Philips Corp., 55 F.R.D. 487 (S.D.N.Y. 1972); Lucas v. Curran, 62 F.R.D. 336 (E.D. Pa. 1974); Buck v. Board of Education of the City of New York, 16 F.R.Serv. 2d 112 (E.D.N.Y. 1972) (question not considered).

There are several reasons why the equipment should be operated by an independent operator, qualified as provided in the Federal Rules, who should also certify the typed transcripts of the depositions. First, an independent "court reporter" is required by the Federal Rules of Civil Procedure. Fed.R.Civ.P. 28(a), (c) and 30(f); Cf. Marlboro Products Corp. v. North American Philips Corp., supra. Second, counsel should not be required to assume the technical and mechanical responsibilities of the operation of the equipment. Jarosiewicz v. Conlisk, supra; Kallen v. Nexus Corp., supra.

Moreover, if transcripts are prepared from the tape recordings by an adversary in the proceeding, rather

than an independent "court reporter", counsel for the opposing parties would be obliged, at their expense, to compare the transcripts against the tapes themselves. It is respectfully submitted that the attempt of the Browning Committee to shift this expense to defendants is not justified, particularly since the expense of taking depositions has traditionally been borne by the party calling them.

Courts which have considered the problems involved have imposed conditions in connection with orders permitting the taking of deposition testimony by the use of tape recording equipment which the Browning Committee sought to dispense with. A set of reasonable conditions is set forth in Kallen v. Nexus Corp., supra. See also Wescott v. Neeman, supra.

Thus, for the reasons set forth above, DASA opposed the motion for an order directing that deposition testimony be taken through the use of tape recording equipment, and it is respectfully submitted that the District Court properly exercised its discretion in denying the motion.

DASA vigorously opposed the motion for an order requiring it to submit proposed findings of fact. DASA's objection to the suggested procedure regarding proposed findings of fact was that it could not serve to narrow or

eliminate issues, because the Browning Committee's purported proposed findings of fact with respect to Claim 3 of the Complaint (relating to the Solicitation Letter distributed to DASA's Debenture Holders) are argumentative, replete with characterizations and seek admissions of facts to which DASA cannot admit, such as whether on a certain date the Browning Committee's attorneys mailed a designated letter to a third party, and other purported facts not within DASA's knowledge. Moreover, as appears from a review of the proposed findings (Ex. A submitted with DASA's memorandum in opposition to the motion of the Browning Committee for taped depositions and a pre-trial order), most of them are completely irrelevant.

With respect to the first 67 purported facts, in addition to their obvious deficiencies, it is respectfully submitted that they could only have been designed to oppress DASA. This conclusion must be drawn from the fact that DASA has been confronted with and required to respond to those same 67 purported facts on at least two prior occasions in the course of this litigation. Those 67 purported facts appeared in two previous documents bearing different titles, to which DASA was required to respond.

First, in connection with the Browning Committee's motion for summary judgment on Claims 1 and 2 of the Complaint, the Browning Committee served a purported Rule 9(g) Statement. A review of that Statement, containing 67 purported facts,

discloses that the first 67 purported facts in the Browning Committee's proposed findings concerning Claim 3 repeat the purported facts in the Rule 9(g) Statement virtually verbatim.

Thereafter, on or about August 10, 1973, the Browning Committee served DASA with a "Request for Admission of Facts, No. 1". Again, the same 67 purported facts appear virtually verbatim.

With respect to the additional purported proposed findings of fact, Nos. 68 to 92, they can only be described as argumentative. Moreover, they principally require DASA to admit or reject characterizations of the contents of written documents.

The Browning Committee's proposals cannot resemble anything envisioned by Fed. R. Civ. P. 16. Stipulations cannot be made when proposed purported facts include such phrases as "significant or substantial fiduciary duty or obligation" (No. 68), "calculated to advocate or protect the financial interests of the debenture holders as a group" (No. 74), "disclosed in clear language readily comprehensible to an unsophisticated reader" (No. 77), "management regarded itself as representing and protecting the interests of only the common shareholders at the expense of the financial best interests of the debenture holders" (No. 78), "the solicitation letter was materially misleading" (No. 82), "as the

result of its own negligence and unexplained inattention" (No. 83), "proposed conversion price was not selected by fair and reasonable application of sound principles of financial analysis" (No. 88), "proposed conversion price was seriously unfair and inequitable" (No. 90), "financial interests of the debenture holders were not seriously, fairly or equitably considered" (No.91).

In view of the foregoing, the District Court apparently concluded that it would serve no useful purpose to require the parties to attempt to deal with the totally inappropriate and unduly repetitive proposed findings suggested by the Browning Committee.

In any event, the requests denied by the Order were addressed to matters within the discretion of the District Judge. The District Judge, who is familiar with this action and its nature and purpose, could evaluate the possible benefits and prejudice of the relief requested by the Browning Committee. The showing which the Browning Committee must make under these circumstances was succinctly described in Delno v. Market St. Ry. Co., 124 F.2d 965 (9th Cir. 1942) where the Court stated that a Court's discretion is abused:

> "...when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." 124 F.2d at 967

Far from meeting this standard, the Browning Committee has not made any showing that Judge Owen's decision was one with which any reasonable man would disagree. Thus, the Browning Committee has not shown any abuse of discretion in connection with the Order, or even suggested any reason for a claim of abuse of discretion. Accordingly, even if the Order were appealable, it is respectfully submitted that it should be affirmed in all respects.

Point VII

> DASA should be awarded damages and double costs, including attorneys' fees, on the ground that this appeal is frivolous

It is respectfully submitted that this action was commenced to achieve a collateral purpose by the use of confected claims of violations of the proxy rules. It has been pending for three years and has been prosecuted by a series of meritless motions by the Browning Committee. The District Court judges who have considered the various motions

have recognized the true nature and purposes of this action and have evidenced that recognition in the various decisions filed in the District Court.

It is also readily apparent that this appeal is frivolous. Having made baseless accusations of proxy fraud in Claims 1 and 2, and having moved for summary judgment on the basis of the unsupported allegations of the Complaint alone, the Browning Committee persists in its harassing tactics by pressing an appeal from the Judgment even though the only relief sought by Claims 1 and 2 is an order directing DASA to rehold its 1972 annual meeting of stockholders -- an order which cannot conceivably benefit the Browning Committee or anyone else. And the Order from which they appeal is clearly interlocutory and not appealable, and in any event, the Browning Committee has not even suggested any ground for reversal of the Order.

It is respectfully submitted that the Browning Committee should not be permitted to abuse the processes of the Federal Courts as devices to attempt to coerce the management of DASA to acquiesce in the dictates of the Browning Committee with respect to a reduced conversion price of the Debentures, and that DASA and its security holders should not be forced to bear the heavy expense of defending this baseless action and frivolous appeal.

Accordingly, it is respectfully submitted that DASA should be awarded damages and double costs, including attorneys' fees, pursuant to Rule 38 of the Federal Rules of Appellate Procedure.

Conclusion

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed, and alternatively, that the Judgment and Order should be affirmed.

Respectfully submitted,

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Of Counsel:

I. Michael Bayda
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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

NORMAN TRABULUS, being duly sworn deposes and says:

That he is not a party to the action, is over 18 years of age, and resides at 530 Grand Street, New York, New York, and that on the 10th day of March, 1975, deponent served the annexed Brief of Defendant-Appellee upon

BREWER & SOEIRO
Attorneys for
Plaintiffs-Appellants
at
257 Park Avenue South
New York, New York 10010

the address designated by said attorneys for that purpose, by depositing two true copies of the same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States postal service within the State of New York.

Norman Trabulus
Norman Trabulus

Sworn to before me this
11th day of March, 1975.

David R. Bird
Notary Public

DAVID R. BIRK
Notary Public, State of New York
No. 31-4600715
Qualified in New York County
Commission Expires March 30, 1976